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## State v. Bennett Respondent's Brief Dckt. 40770

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

BARCLAY DYLAN BENNETT,

Defendant-Appellant.

No. 40770

Kootenai Co. Case No.  
CR-2011-17700

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**BRIEF OF RESPONDENT**

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APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF KOOTENAI

---

HONORABLE BENJAMIN R. SIMPSON  
District Judge

---

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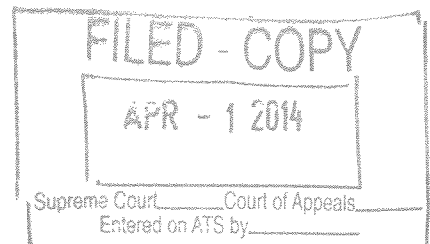
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## STATEMENT OF THE CASE

### Nature Of The Case

Barclay Dylan Bennett appeals from his convictions by a jury for possession of a controlled substance and possession of drug paraphernalia.

### Statement Of The Facts And Course Of The Proceedings

Law enforcement went to the home of William Bailey to arrest Bennett on several outstanding felony warrants. (PSI, pp.1-2.) The police found a plastic container with methamphetamine located among Bennett's possessions on a dresser in the room Bennett was staying. (PSI, p.2.) The state charged Bennett with possession of methamphetamine, possession of paraphernalia, and a felony enhancement for being a persistent violator. (R., pp.48-50.)

At the close of the state's case at trial, Bennett made a motion to dismiss the case pursuant to Rule 29. (Tr., p.96, L.17 – p.97, L.4.) The district court denied the motion, finding there was "enough evidence from which a reasonable jury, by implication, could find the toiletries [located on the dresser with the methamphetamine] were Mr. Bennett's." (Tr., p.104, Ls.22-24.) Bennett did not present any evidence. (Tr., p.105, L.1 – p.106, L.1.) The jury ultimately convicted Bennett of both possession of methamphetamine and possession of drug paraphernalia. (R., pp.179-180.) Bennett then entered a conditional guilty plea to the persistent violator enhancement. (Tr., p.111, L.14 – p.114, L.15.)

Bennett filed a motion for a judgment of acquittal following the guilty verdict based on his claim of an insufficiency of the evidence to prove he possessed the controlled substance in question. (R., pp.181-182.) He simultaneously filed a Rule 34

motion for a new trial alleging the jury was improperly instructed as to the law relating to constructive possession. (R., pp.183-184.) Although both matters were set for hearing, the parties submitted the issues on their respective briefs without presenting any argument to the court. (Tr., p.120, Ls.6-15.) The court issued a written decision finding the jury was properly instructed and reiterated its finding at sentencing that there was sufficient evidence presented at trial upon which a reasonable jury could find Bennett guilty. (R., pp.233-237; Tr., p.126, L.17 – p.127, L.22.)

The district court sentence Bennett to a unified term of nine years with the first three years fixed. (R., pp.245-247; Tr., p.140, Ls.17-21.) Bennett timely appealed. (R., pp.252-255.)

## ISSUES

Bennett states the issues on appeal as follows:

1. Whether the jury was properly instructed on the applicable law and if the district court erred in denying his motion for a new trial pursuant to Idaho Criminal Rule 34.
2. Whether the evidence against Mr. Bennett was sufficient to support the convictions and the district court erred in denying Mr. Bennett's motions for judgment of acquittal pursuant to Idaho Criminal Rule 29.

(Appellant's brief, p.9.)

The state rephrases the issues as:

1. Is there substantial evidence in the record to support the jury's verdicts finding Bennett guilty of possession of methamphetamine and possession of drug paraphernalia?
2. Has Bennett failed to show any error in the district court's refusal to instruct the jury as he requested?

## ARGUMENT

### I.

#### There Is Substantial Evidence In The Record To Support The Jury's Verdicts Finding Bennett Guilty Of Possession Of Methamphetamine And Possession Of Drug Paraphernalia

##### A. Introduction

Bennett argues on appeal that the jury's verdicts finding him guilty of possession of methamphetamine and drug paraphernalia were not supported by adequate evidence. (Appellant's brief, pp.15-20.) Bennett specifically claims "[w]hile the State did establish Mr. Bennett's proximity to the illegal contraband and arguably a reasonable inference supporting his knowledge of its existence, there is insufficient evidence suggesting Mr. Bennett had control over the methamphetamine and paraphernalia to establish constructive possession." (Appellant's brief, p.16.) Because there was substantial evidence presented at trial showing he possessed or constructively possessed methamphetamine and drug paraphernalia, Bennett's argument fails.

##### B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a jury verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Sheahan, 139 Idaho 267, 285-86, 77 P.3d 956, 974-75 (2003); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992). The appellate court will not substitute its view for that of the jury as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. State v. Hoyle, 140 Idaho 679, 683-84, 99 P.3d 1069, 1073-74 (2004) (plurality); State v.



Knutson, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991); State v. Decker, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985).

In determining if the evidence is substantial and competent, it will be considered in the light most favorable to the prosecution. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); Knutson, 121 Idaho at 104, 822 P.2d at 1001. Substantial evidence is present when a “reasonable mind” could conclude that guilt was proved beyond a reasonable doubt. Hoyle, 140 Idaho at 683-684, 99 P.3d at 1073-1074.

C. Substantial Evidence Supports The Jury’s Verdict That Bennett Had Constructive Possession Of Methamphetamine And Drug Paraphernalia

An “appellate court's function is not to weigh and consider the contradictions and inconsistencies which appellant finds in the testimony, but rather to determine whether there is substantial evidence in support of the verdict of the jury, taking the view of the evidence most favorable to the sustained party.” State v. Gissel, 105 Idaho 287, 292, 668 P.2d 1018, 1023 (Ct. App. 1983). Actual possession requires possession and the knowledge that one is in possession of the substance. State v. Blake, 133 Idaho 237, 240-241, 985 P.2d 117, 120-121 (1999). Constructive possession “exists where a nexus between the accused and the substance is sufficiently proven so as to give rise to the reasonable inference that the accused was not simply a bystander but, rather, had the power and intent to exercise dominion and control over the substance.” State v. Crawford, 130 Idaho 592, 595, 944 P.2d 727, 730 (Ct. App. 1997). Therefore, the relevant inquiry is limited to whether there is substantial evidence in the record supporting the jury’s verdicts that Bennett knew about the presence of the

methamphetamine and paraphernalia on the dresser among his belongings, and either had physical control of it or the power and intention to exercise dominion and control over it. (See R., pp.78, 165; ICJI 421.) The record reveals there was substantial evidence supporting the jury's verdict that Bennett was guilty of possession of methamphetamine and possession of drug paraphernalia.

Bailey testified that Bennett was staying in his daughter's room:

Q. Okay. Without specifying the dates, towards the end of September was a Mr. Barclay Bennett staying in your house?

A. Yes.

Q. How many days did he stay in your house?

A. Two days.

Q. Two days. And what room of your house did he stay in?

A. He was in my daughter's bedroom.

(Tr., p.86, Ls.14-22.) Although a believed "meth user" stayed in Bailey's daughter's bedrooms two months before Bennett's visit, Bailey testified he had access to his daughter's room and had never seen the plastic container with methamphetamine police found there. (See Tr., p.87, L.4 – p.91, L12.)

The officer who entered the room where Bennett was temporarily staying testified that when he entered the bedroom he saw two people. (Tr., p.22, Ls.19-22.) One was Bennett and the other was a female. (Tr., p.24, Ls.7-17.) The officer testified:

Q. ... What direction was the defendant facing when you entered the room?

A. He was facing this back wall, and there was an open drawer on this dresser here.

...

Q. Okay. What happens next after you have him in handcuffs?

A. I then move him away from this open drawer area here and hand him off to Deputy Miller back this way.

Q. Okay. Did you do anything else in the room at that point?

A. Yes. I looked here at this open drawer just to make sure there wasn't any type of weapon or anything like that that he had placed into that drawer. And then as I was turning this way, I noticed an item here on the dresser that caught my eye.

Q. Okay. Do you remember everything that was on the top of that dresser that night?

A. I don't remember everything. I couldn't testify to everything that was on top of that dresser. I do remember some items.

Q. What items in particular do you remember seeing on top of that dresser?

A. Mens [sic] toiletries, deodorant, shaving cream, that type of thing, stuff I recognize that I would use, mens [sic].

Q. Anything else?

A. I recognized a small plastic container containing what I recognized to be contraband.

...

Q. ... could you tell us where that plastic container was found?

A. The items of toiletries were here [drawing on a whiteboard]. Several containers. There may have been a shave bag or something there. And then right here would have been the item that I recognized.

Q. So it was in among those items?

A. Right next to those, yes.

Q. And what was the proximity to those items, including the plastic container, to that open drawer?

A. Inches. Maybe a foot between here and there.

Q. What about the physical proximity of the defendant when you enter that room to those items?

A. He was standing here. So, you know, again, a foot to 18 inches away.

Q. A foot to 18 inches is your estimate?

A. Yes.

(Tr., p.25, L.12 – p.29, L.8.)

The trial court correctly concluded that the jury could reasonably infer from the evidence that Bennett either possessed or had the power to possess the drugs in question:

And my recollection of the testimony in the trial was that when the officers entered the room, Mr. Bennett was standing in close proximity to a dresser. On top of that dresser were toiletries related to a male. The room was in fact the bedroom of an 11-year old girl, who was the daughter of the tenant in the premises; that the father of that child had allowed Mr. Bennett to use the room for a period of approximately two days; that over a substantial period of time that parent had been in and out of the room, had never seen any evidence of drug paraphernalia or drugs in the room.

Further, he did not know – Mr. Walsh specifically asked the tenant whether he knew whether his daughter used drugs. The response, as I recall, was she has never been in trouble like of that kind.

Further testimony was that Mr. Bennett was in close proximity to that dresser, not very far at all.

(Tr., p.126, L.22 – p.127, L.13.)

As the trial court properly concluded, the testimony presented at trial provided substantial evidence whereby a jury could have reasonably concluded Bennett knew about the presence of the methamphetamine and paraphernalia lying with his toiletries on top of the dresser in the room he was staying, and either had physical control of the items or the power and intention to control them. Consequently, there is no basis for

Bennett's contention that there was insufficient evidence to convict him of those charges.

## II.

### Bennett Has Failed To Show Error In The Jury Instructions

#### A. Introduction

Bennett contends that the district court erred by declining to give at least one of three of his requested jury instructions on proximity. (Appellant's brief, pp.9-14; R., pp.121-126.) Bennett's claim of instructional error is without merit. The district court correctly determined that Bennett was not entitled to a "mere proximity" instruction because the latest version of ICJI 421 provides all the definition necessary for distinguishing between actual and constructive possession.

#### B. Standard Of Review

Whether the jury instructions, when considered as a whole, fairly and adequately present the issues and state the applicable law is a question of law over which the appellate court exercises free review. State v. Bush, 131 Idaho 22, 32, 951 P.2d 1249, 1259 (1997); State v. Zichko, 129 Idaho 259, 923 P.2d 966, 971 (1996).

#### C. Bennett Has Failed To Show The District Court Erred By Refusing His "Mere Proximity" Instruction

In denying Bennett's request to have the jury instructed that mere proximity to a controlled substance is not sufficient to prove possession, the district court explained:

The Court is going to stick with the Court's proposed 14. It is consistent with ICJI. And I think that the proposed Exhibit [sic] 1, 2, and 3 from the defendant have the potential to confuse and mislead the jury.

There is evidence in the record beyond mere presence and proximity. The core issue in this case is related to whether or not the defendant had the opportunity, the power to exercise control over the substance and knew of its presence. I think we have a clear jury instruction and a clear question for the jury.

(Supp. Tr., p.102, L.23 – p.103, L.8.)

The latest version of the Idaho Criminal Jury Instructions went into effect on September 1, 2010. (See ICJI, Order of Aug. 26, 2010 by Chief Justice Daniel T. Eismann.) Although ICJI 421 does not state that mere presence is not enough to find a person in “possession” of a controlled substance, it sets out what *is* required, as follows:

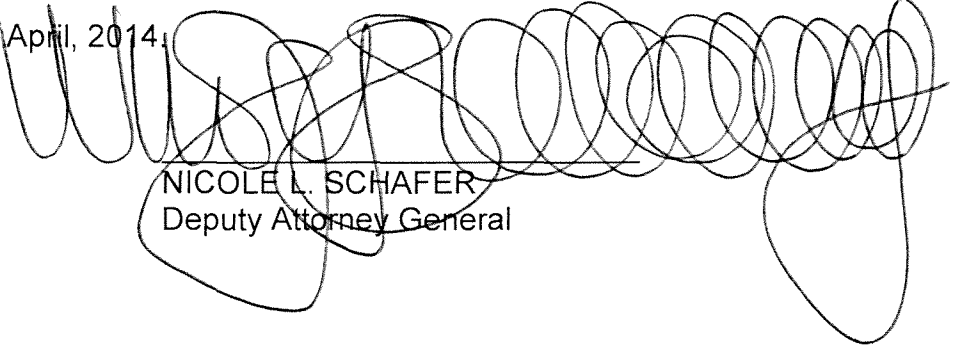
A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it. More than one person can be in possession of something if each knows of its presence and has the power and intention to control it.

ICJI 421 (see R., p.78). The pattern ICJI instructions are presumptively correct. State v. Cuevas-Hernandez, 140 Idaho 373, 376, 92 P.3d 704, 707 (Ct. App. 2004); McKay v. State, 148 Idaho 567, 571 n.2, 225 P.3d 700, 704 n.2 (2010) (citations omitted). By requiring proof that a person both know of a controlled substance's presence and have physical control (or the power and intention to control it), ICJI 421 makes it clear that a defendant's mere presence is not enough to prove possession. ICJI 421 is a complete and accurate statement of the law. See State v. Seitter, 127 Idaho 356, 359-360, 900 P.2d 1367, 1370-1371 (1995) (“No further instruction [that ICJI 421] is necessary to ‘accurately state the law.’”). Bennett has failed to show that this instruction did not fairly and accurately state the applicable law. He has therefore failed to show error by the district court.

CONCLUSION

The state requests this Court to affirm Bennett's convictions for possession of a controlled substance (methamphetamine) and possession of drug paraphernalia.

DATED this 1st day of April, 2014.

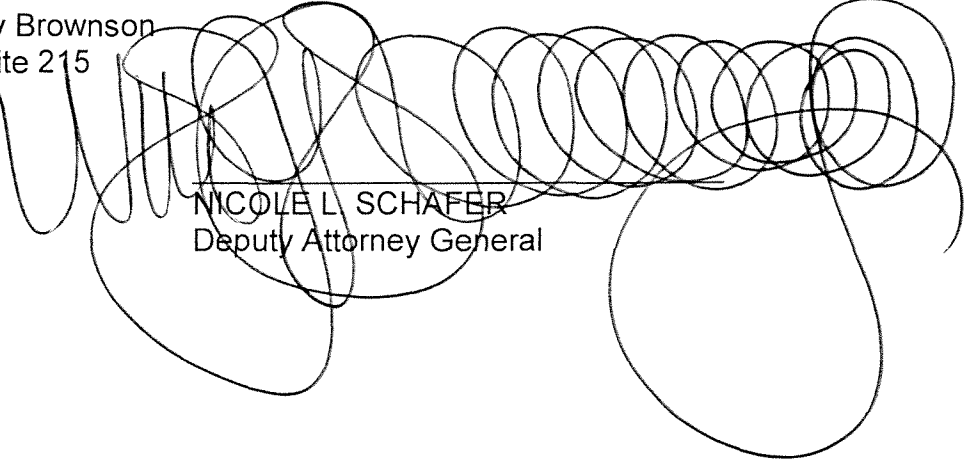


NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 1st day of April, 2014, served two true and correct copies of the attached RESPONDENT'S BRIEF by placing the copies in the United States mail, postage prepaid, addressed to:

JEFFERY BROWNSON  
Law Office of Jeffrey Brownson  
223 North 6<sup>th</sup> St, Suite 215  
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NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm